

## **GENERAL OUTLINE FOR ISSUE SPOTTING – ASYLUM/WH/CAT**

(Note—not all issues will arise in every case and may need to skip around)

### **ASYLUM & WH (under INA)**

- I. One-year Bar for Asylum only (common issue at outset)
  - A. Two possible exceptions:
    1. Changed Circumstances (including changed ctly conditions or personal circ)
    2. Extraordinary Circumstances (see regs for examples)
- II. Credibility (can bar all 3 forms of relief if all based on same facts)
  - A. Post-REAL ID Act = “totality of the circumstances” standard
  - B. Pre-REAL ID Act = often requires discrepancies go to “heart of claim”
- III. Corroboration (can also bar all 3 forms of relief)
  - A. If not credible, lack of credibility can be rehabilitated by sufficient corroboration
  - B. Even if credible, however, corroborating evidence can be required (unless it cannot be reasonably obtained or there is a reasonable explanation for its absence)
    1. Note—Cir Cts are split re whether IJ must give notice and opportunity to obtain evidence (3d and 9<sup>th</sup> require notice/opp; 2d, 6<sup>th</sup>, and 7<sup>th</sup> do not/BIA does not)
    2. Note—pre-REAL ID Act has different corroboration requirements—often cannot ask for corroboration unless R found not cred
- IV. Past Persecution (R has BOP)
  - A. Level of harm must rise to level of persecution (check Cir Cts for examples)
    1. Use cumulative approach (if multiple incidents)
  - B. If PP established, presumption of WFF (BOP shifts to DHS to rebut)
    1. Asylum BOP = reasonable possibility of persecution or 10% chance
    2. WH BOP = clear probability or more likely than not or more than 50% chance
  - C. R must also show (2) nexus to (1) protected ground
    1. Protected grounds = race, religion, political opinion, nationality, MPSG
      - a) If MPSG alleged:
        - (1) Must be articulated before IJ
        - (2) Must be cognizable – 3 elements: immutability, particularity, social distinction (and cannot be circular)
      - b) R must also be member of PSG
    2. Nexus—was harm inflicted on account of the protected ground?
      - a) Post-REAL ID Act = protected ground must be “at least one central reason”
        - (1) BIA + most Cir Cts apply one central reason to WH too
        - (2) 9<sup>th</sup> Cir – only applies one central reason to asylum; protected ground need only be “a reason” for WH
      - b) Pre-REAL ID Act = allows “mixed motives” (a reason need not be “central”)
- V. R must also show persec is by gov or by private actors gov is unwilling or unable to control
  - A. Check Cir Ct law – some focus on:
    1. Gov complicity with private actors
    2. Widespread corruption/unwillingness to prosecute

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VII. If WFF established, BOP shifts to DHS to rebut by POE – 2 ways:

- Fundamental change in circumstances
- Internal relocation is reasonable (if non-state actor; if gov is persecutor, presumption that relocation is not reasonable)
  - Must show R has ability to relocate (i.e., substantially better conditions exist elsewhere)
  - And relocation is reasonable = totality of circ standard (see regs for examples)
  - Persecution must be country-wide or fear is not WF

VIII. If WFF is rebutted by DHS, and PP was established, R can still obtain “humanitarian asylum” if:

- Compelling reasons exist arising out of the severity of the PP; or
- Reasonable possibility of other serious harm exists (note—no nexus to harm required)

IX. Even if no PP, R can obtain asylum/WH if shows:

- “Well-founded” fear of persecution—two requirements:
  - Subjective fear (i.e., R is credible about fear)
  - Objective fear (reasonable person standard)
    - Asylum = reasonable possibility or at least 10% chance
    - WH = clear probability or more likely than not or more than 50% chance
- Again, must have nexus to a protected ground—see section IV.C above

X. Even if R establishes WFF or clear probability w/o PP, R must show:

- Internal relocation not reasonable – R has BOP unless gov is persecutor; then DHS has BOP to disprove presumption of WFF by POE
- If gov is not persecutor, persecution must be country-wide

XI. Other ways to establish WFF (other than individual persecution)

- Pattern or practice of persecution against group in which R is a member
- “Disfavored group” analysis – only 9<sup>th</sup> Cir

XII. Again, must show government is unwilling or unable to protect R from persecution by 3d person(s) – see section VI above

XIII. Discretionary Denial of Asylum (WH is mandatory if R meets BOP)

- IJ must reconsider a discretionary denial of asylum if grants WH, in order to take into consideration family reunification (i.e., only asylum allows for derivative asylum) (see regs)

### CAT – WH & DEFERRAL (in regs, not INA)

I. BOP = same as for WH under INA – clear probability or more likely than not will be tortured or ≥ 50%

- 7th Cir has lower BOP = “substantial risk” of torture
- Claim cannot be based on “string of suppositions”

II. No need for a protected ground or nexus

III. Requirements:

- Past or future torture established as defined – see regs and case law
- Must be by or with acquiescence of gov or gov is “willfully blind” to torture by 3d parties

IV. Same bars to relief apply as for WH under INA, but R can still get deferral of removal

## **BARS TO RELIEF**

### I. Bars to Asylum:

- A. 1-yr bar (discussed above; 2 exceptions)
- B. Firm Resettlement – 4-step process under *Matter of A-G-G-*
- C. Safe Third Country Agreement (Canada)
- D. Frivolous Asylum Claims
  - 1. Notice required and
  - 2. Opportunity to explain
- E. Previously-filed Asylum Application
- F. Reinstated Removal Order

### II. Bars to Asylum & WH (under INA and CAT):

- A. Persecutor Bar – limited duress exception – *see Matter of Negusie*
- B. Particularly Serious Crime (PSC) Bar
  - 1. For asylum, an aggfel is automatically a PSC and R barred
  - 2. For WH, if aggfel sentence  $\geq$  5 yrs, then PSC and barred
  - 3. For WH, if aggfel sentence  $<$  5 yrs, then not automatically bar, but can still be a PSC based on nature of the crime
- C. Serious Non-Political Crime Bar
- D. Security Threat Bar
- E. Terrorist Bar
  - 1. 3 possible tiers of terrorist organizations
  - 2. Material Support – no duress exception
  - 3. Possible waiver granted by DHS, but IJ/BIA must use “but for” analysis first